IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Honorable Mark J. Cavanagh, Presiding

JAMES LITTLE, CHERYL LITTLE, STEVEN RAMSBY, MARY KAVANAUGH, STANLEY W. THOMAS, NANCY G. THOMAS, MICHAEL & GLADYS McCLUSKY, and ANN SKOGLUND,

Plaintiffs/Counter-Defendants/Appellants/
SUPREME COURT APPELLANTS,

Supreme Court Docket No. 121836

v

BETTY H. HIRSCHMAN,

Defendant/Counter-Plaintiff/Appellee/
SUPREME COURT APPELLEE,

and

GERALD W. CARRIER, SALLY ANN CARRIER, JOHN P. VIAU, and GENEVIEVE GUENTHER VIAU,

Defendants/Counter-Plaintiffs,

and

FRANCIS J. VanANTWERP, ELIZABETH VanANTWERP, MASON F. SHOUDER, and JEAN ANN SHOUDER,

Defendants.
_____/

MICHIGAN ASSOCIATION OF REALTORS'® BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

Gregory L. McClelland (P28894)
Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Amicus Curiae Michigan Association of REALTORS®
1305 S. Washington Avenue, Suite 102
Lansing, MI 48910
(517) 482-4890

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2) and MCR 7.302. Plaintiffs/Appellants filed a timely Application for Leave to Appeal on June 24, 2002, which was granted by Order of this Court dated March 25, 2003.

QUESTION PRESENTED FOR REVIEW

I. SHOULD THIS COURT REVERSE AND/OR VACATE THE COURT OF APPEALS' OPINION THAT A DEDICATION OF PARKS TO THE OWNERS OF THE SEVERAL LOTS, MADE IN A 1913 PLAT, IS INVALID UNDER MICHIGAN LAW?

The Trial Court would, presumably, answer "Yes."

The Court of Appeals would answer "No."

Plaintiffs/Appellants, answer "Yes."

Defendant/Appellee answers, "No."

Amicus Curiae, Michigan Association of REALTORS®, answers "Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 48 local boards and a membership of more than 26,000 brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions, many of which involve the sale of homes, that through a dedication to back lot owners within a plat, purport to have access to, and use of, beaches, lakes, rivers and other recreational areas. The Court of Appeals' Opinion, in this case, casts substantial doubt on the validity of these types of dedications notwithstanding that current and past lot owners in these plats have relied on these dedications for decades and the Association's members, sellers and potential buyers shall rely on these dedications in the future. Uncertainty of the legality of such private dedications has the potential for exposing the Association's members, sellers and buyers to numerous forms of liability such as fraud, misrepresentation and breach of contract. Consequently, the Association and its members have a significant interest in the outcome of any court decision that involves the issue of the legality of private dedications in plats.

In Grand Rapids v Consumers Power Co, 216 Mich 409, 418; 185 NW 852 (1921), this Court stated: "[t]his Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief Amicus Curiae . . ." The Association believes that this case involves an issue of fundamental importance to the Association and its more than 26,000 members, as it involves the scope of a statutory exemption to liability under the MCPA that applies to regulated professionals such as REALTORS®. The Association's experience and

expertise could be beneficial to this Court in resolving the substantive issue presented by this appeal.

Accordingly, by Order of this Court, dated March 25, 2003, the Association's Motion for leave to file a Brief Amicus Curiae was granted. The Association previously filed a Brief Amicus Curiae in support of Plaintiffs/Appellants' Application for Leave to Appeal. The Association now files this Brief Amicus Curiae in support of Plaintiffs/Appellants' Brief on Appeal.

II. SUMMARY OF MATERIAL FACTS AND PROCEEDINGS

A. Background Facts

The pertinent facts to this appeal, insofar as the Association is aware, are essentially undisputed. On August 20, 1913, C.E. Foote and H.A. Hirschman filed the plat for Ye-ga-qua-mak Subdivision (the "Plat"). (Appellants' Appendix, p 213 a). Ye-ga-qua-mak Subdivision is located at the juncture of the Cheboygan River and Mullett Lake in Cheboygan County, Michigan. (Appellants' Appendix, p 213 a). Plaintiffs/Appellants are lot owners in Ye-ga-qua-mak Subdivision, as is Defendant/Appellee, Betty H. Hirschman ("Hirschman") (Appellants' Appendix, p 213 a).

The Plat contains streets and alleys which were "dedicated to the use of the public." The Plat also refers to two parks: Lakeside Park which abuts Mullett Lake, and Riverside Park, which abuts the Cheboygan River (collectively, the "Parks"). The Plat states that the Parks are "dedicated to the owners of the several lots" in the Plat. (Appellants' Appendix, pp 214 a and 216 a).

Hirschman is the current owner of Lots 46 and 47 in the Plat ("Hirschman's Property"). Hirschman's Property borders Riverside Park to the east, Lakeside Park to the south, and an alley which provides access to Lakeside Park to the west (the "Alley"). (Appellants' Appendix, p 175 a). Plaintiffs/Appellants are back lot owners who, consistent with the dedications in the Plat, have used the Alley and Parks.

Lakeside Park contains a beach area which abuts Mullett Lake. (Appellants' Appendix, p 214 a). In accordance with the dedications in the Plat, "for as long as the parties can remember and dating back at least to the 1940s," the residents of the Plat have regularly used Lakeside Park for sunbathing, swimming, picnicking and other recreational beach-related activities. The residents of the Plat have always accessed Lakeside Park using the Alley next to Hirschman's Property, between Lots 47 and 48 of the Plat. (Appellants' Appendix, p 214 a). The residents of the Plat have regularly had bonfires at Lakeside Park (and have a fire pit located there for that purpose) and have used a table and bench located on the beach side of the Alley to picnic, relax and store their towels while swimming. (Appellants' Appendix, pp 214 a - 215 a). Over the years, the residents of the Plat have collected funds and pooled their resources to clean and maintain the beach area located in Lakeside Park. (Appellants' Appendix, p 215 a).

Similarly, Riverside Park has historically been used by residents of the Plat for fishing and walking. As indicated, this park also abuts Hirschman's Property. Riverside Park is a grassy area with no beaches and abuts the Cheboygan River. (Appellants' Appendix, p 215 a).

Use of the Parks by the residents, over the many years since 1913, was never objected to by Hirschman or her predecessors in title until recently. This dispute arose in the

mid-1990s when Hirschman took steps to stop use of the Alley and Parks by residents of the Plat. (Appellants' Appendix, p 240 a).

B. The Trial Court Proceedings and Opinion

Plaintiffs/Appellants filed a multi-count complaint against Hirschman and other defendants (not parties to this appeal) asserting various legal theories and seeking equitable relief in the form of a declaration and injunctive order from the Court permitting use of the alleys in the Plat (including the Alley providing access to Lakeside Park) and the Parks by Plaintiffs/Appellants, consistent with their traditional and historical use and the dedications made in the Plat. Hirschman and the other defendants, in turn, filed a Counterclaim seeking a declaration from the Court that Plaintiffs/Appellants had no rights in the Alley and that Lakeside Park had never been properly dedicated but, rather, was abandoned. (Appellants' Appendix, pp 14 a - 73 a).

After a two-day bench trial, the trial court entered its opinion on February 25, 2000 in favor of Plaintiffs/Appellants. (Appellants' Appendix, pp 213 a - 221 a). On March 21, 2000, the trial court entered an Order of Final Judgment and Permanent Injunction which granted Plaintiffs/Appellants use of all alleys located within the Plat and use of the Parks. (Appellants' Appendix, pp 222 a - 225 a).

The trial court, having heard the testimony of the witnesses, ruled that, based on the traditional and historical use of the alleys and Parks, and the intent of the plattors, the dedications in the Plat allowed the residents of the Plat to use the Alley for access to the Parks and use the Parks for such traditional uses such as swimming, sunbathing, picnicking, etc. (Appellants' Appendix, p 218 a). The trial court's ruling, however, was not without limitation.

Specifically, the trial court determined that, in 1913, it was not contemplated by the plattors in 1913 that the Parks and beach would accommodate motorized jet skis and the like or be used for all-night parties, motor vehicles or camping. Therefore, the trial court restricted Plaintiffs/Appellants' access to, and use of, the Parks to no later than 10:00 p.m. and banned the use of motorized vehicles on the beach or use of personal water crafts such as jet skis, etc. (Appellants' Appendix, pp 218 a - 219 a).

C. The Court Of Appeals' Opinion

On June 7, 2000, Hirschman filed a Claim of Appeal with the Court of Appeals. On appeal, Hirschman did not argue, as she had at the trial court level, that the dedication of the Parks in the Plat were abandoned. Instead, Hirschman argued that the dedication of the Parks to the several lot owners was invalid, because it was not a dedication to the public but, rather, a private dedication to a mere portion of the public. (Appellants' Appendix, p 238 a).

The Court of Appeals agreed to hear Hirschman's new legal theory, although it was not raised below. The Court of Appeals noted that the Plat used the word "dedication" with reference to the Parks. The Court of Appeals further noted that the Parks were "dedicated" to "the owners of the several lots" in the Plat. The Court of Appeals then held that because "dedications" in plats to anyone other than the entire, general public are illegal, the dedication of the Parks to the lot owners in the Plat was a "private dedication" and thus, invalid as a matter of law. (Appellants' Appendix, p 242 a).

The Court of Appeals' opinion turned solely on the Plat's use of the word "dedication." More specifically, the Court of Appeals, citing its earlier decision in Martin v Redmond, 248 Mich App 59; 638 NW2d 142 (2001), appeal granted ___ NW2d ___ (March 25,

2003), stated ". . . we disagree with the trial court's conclusion given the Martin Court's express conclusion that private 'dedications' are invalid under Michigan law." (Appellants' Appendix, p 243 a).[1]

The Court of Appeals, however, failed to consider all of the relevant and applicable law in Michigan on the issue of private dedications. Contrary to well-established Michigan case law, the Court of Appeals ignored the intent of the drafters of the Plat and the historical use of the Parks in determining the rights of the parties to the use of the Parks. This is not only clear error, but somewhat inconsistent, given that following its ruling that all private dedications are illegal, the Court of Appeals remanded this case to the trial court. On remand, the trial court was ordered to render findings of fact and conclusions of law on Plaintiffs/Appellants' acquiescence and prescriptive easement theories as follows:

> On remand, if the trial court determines that plaintiffs are entitled to use of the parks, the trial court shall also determine what use of the alleys by plaintiffs is consistent with the scope of the dedication. See, e.g., *Thies v Howland*, 424 Mich 282, 289; 380 NW2d 463 (1985); *McCardel v Smolen*, 404 Mich 89, 97; 273 NW2d 3 (1978); *Little v Kin*, ____ Mich App ____, ____ NW2d ____ (Docket No. 220894, issued February 1, 2002), slip op, 5-6. ""The intent of the plattors must be determined from the language they used and the surrounding circumstances."" *Thies, supra* at 293, quoting *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). However, where the plattors' intent is not discernable from the four corners of the plat, the contemporaneous and subsequent acts of the party may aid the court in its determination of the scope of the dedication. *Jacobs v Lyon Twp*, 444 Mich 914, 921; 512 NW2d 834 (1994) (Levin, J. dissenting).

(Appellants' Appendix, pp 243 a - 244 a). Accordingly, Plaintiffs/Appellants appealed.

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[1] Pursuant to this Court's March 25, 2003 Order, this case is being submitted and argued together with Martin v Redmond.

III. ARGUMENT

A. Standard of Review

In equity cases, the appellate court reviews the record de novo with due deference being given to the findings of the trial court. The trial court's findings will be sustained unless the appellate court's ruling would have been contrary to that of the trial court. Marconeri v Village of Mancelona, 124 Mich App 286; 335 NW2d 21 (1983). If the trial court's findings of fact are not clearly erroneous, then the appellate court reviews the record de novo to determine whether the equitable relief granted was appropriate in light of those facts. Attorney General v John A. Biewer Co, Inc, 140 Mich App 1; 363 NW2d 712 (1985).

Further, whether private dedications are illegal in the State of Michigan is a question of law. Questions of law are subject to de novo review by this Court. Terrien v Zwit, 467 Mich 56; 648 NW2d 602 (2002).

B. The Effect of the Court of Appeals' Decision

In this case, the Court of Appeals said that no matter what the plattors wanted, no matter how old the Plat, no matter how long the residents of a private subdivision have mutually used dedicated land, there can never, under any circumstances, be a dedication in a plat to anyone other than the public in general. In doing so, the Court of Appeals ignored an entire body of Michigan case law which allows private dedications of the use of land in plats. The Court of Appeals ignored statutory law which demonstrates the clear policy of this state to allow private dedications in plats. The Court of Appeals ignored all of the trial court's findings regarding the intent of the original drafters of the Plat and the historical use of the Parks. Most perplexing, however, is that the Court of Appeals did all of this without saying – why?

Are private dedications just simply wrong? Are private dedications inherently evil? Apparently not, since they are in used throughout the State of Michigan and, are not contrary to public policy, having been clearly permitted by statute. See, Subdivision Control Act of 1967, MCL 560.253(1); MSA 26.430(253)(1), "[w]hen a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat . . ." Nonetheless, the Court of Appeals' decision, without explanation, invalidates all private dedications in older plats (those pre-dating statutorily allowed private dedications) throughout the State of Michigan, notwithstanding past and current lot owners' years of continued mutual use of these lands in reliance upon these private dedications.

This case was filed seeking equitable relief. But, where is the equity in the Court of Appeals' decision? Owners of the waterfront property in older subdivisions throughout Michigan, including the Ye-ga-qua-mak Subdivision, have known about, allowed and accepted the use of privately dedicated property by all other residents of these subdivisions for decades. In turn, the back lot owners who use the dedicated property, have done so for decades and relied upon access to, and use of, the dedicated property when buying their lots. So why must nearly a century of traditional and customary use of property, which use is aligned with the original intent of the plattors, be ignored simply because there was a private "dedication?" The answer is – it should not since, to do so, is to ignore an entire body of Michigan case law.

Moreover, the practical effects/consequences of the Court of Appeals' opinion, require that it be reversed. First, back lot owners' property values will decline while waterfront lot owners reap a windfall property value increase. Back lot summer cottages may eventually be

abandoned altogether. And, all because these can never, ever be a legal private "dedication." See, Jacobs v Lyon Twp, 444 Mich 914, 918; 512 NW2d 834 (1994), wherein, J. Levin, writing in support of granting leave, observed that "[m]uch of the value of their back lots undoubtedly hinged on providing their owners with easy and meaningful access to the lake."

Second, a person trying to sell a back lot in a subdivision which, for years, has had access to, and use of, a beach or recreational area, will not know whether they can legally represent to potential buyers that their lot includes such access and use. If they guess wrong, they will be sued.

In sum, the Court of Appeals preferred form over substance. It focused solely on the Plat's use of the word "dedication" to conclude that 80+ past years of use, and any future use, of the Parks by residents of Ye-ga-qua-mak Subdivision was, is, and will be illegal. In fact, the Court of Appeals went several steps further and invalidated all such dedications throughout the State of Michigan again – merely because of the use of the word "dedication." However, as demonstrated above, to attach such artificial legal significance to the word "dedication," results in not only immediate inequities in this case, but a drastic, inequitable effect on real property throughout the state.

Many early plats, such as the one at issue in this case, use the word "dedication." The simple use of the word "dedication," however, should not control the outcome and obviate subdivision lot owners' long-standing uses of "dedicated" property. Rather, the intent of the drafters of such dedications, the historical use of property by the intended beneficiaries of these dedications and the reliance by buyers and sellers of these properties upon access to, and use of, the dedicated property are the controlling factors under Michigan law.

C. Private Dedications Are Legal In Michigan

As discussed above, the Court of Appeals' opinion fails to examine a line of Michigan case law wherein private dedications have been upheld. This failure constitutes clear error and requires reversal of the Court of Appeals' opinion.

The Court of Appeals did not discuss, or apparently consider, Feldman v Monroe Twp Board, 51 Mich App 752; 216 NW2d 628 (1974), in which plaintiffs filed their lawsuit asking the court to vacate certain areas of a 1928 recorded plat. The plat at issue provided that "the streets, parks and canals as shown on said plat are hereby dedicated to the use of the property owners only." Plaintiffs requested that the court vacate areas of the plat labeled: (1) "La Plaisance Court;" (2) "canal" (westerly); (3) "canal" (easterly); and (4) "park," all of which, at the time of the lawsuit had been privately used, as dedicated, for 45 years. Feldman, 51 Mich App at 753.

After hearing "considerable testimony as to the degree of use that defendants and plaintiffs have made of the dedicated areas," the trial court denied plaintiffs' request to vacate areas of the plat. The Court of Appeals agreed, ruling that:

> A private dedication is 'irrevocable' upon the sale of lots by reference to the plat and the grantees of the dedicators are bound by the dedication.

Feldman, 51 Mich App at 630 (citations omitted).

Defendant/Appellee argued in her Brief in Opposition to Plaintiff/Appellant's Application that this Court should simply ignore Feldman because the cases the Feldman Court relied on do not support the legality of a private dedication but refer only to private rights stemming from a public dedication. While it is true that some cases cited by the Feldman Court

discussed private rights in public dedications, Defendant/Appellee ignores that the Feldman Court's primary reliance was on a decision from this Court from 1938. More specifically, the Feldman court stated: "[f]or a case involving similar facts and support this position, see Schurtz v Wescott, 286 Mich 691; 282 NW 870 (1938)."

Again, however, the Court of Appeals did not discuss, or apparently consider, Schurtz v Wescott, 286 Mich 692; 282 NW 870 (1938). In Schurtz, this Court upheld a private dedication of parks in a 1891 plat – based on the historic use of the dedicated property by the subdivision residents, which created an estoppel. The plat at issue in Schurtz stated that the "streets in the plat were dedicated to the public, but the 'parks' were not so dedicated." Schurtz, 286 Mich at 693. The trial court held that the ownership of any lot in the plat carried with it private rights to the use of the parks as parks in common with other lot owners. Schurtz, 286 Mich at 694. This Court agreed, stating:

> As to the 'parks' the trial court held that any lot owner has the right to the use of the 'parks' in common with other lot owners. In our opinion the trial court was right in so decreeing. The record sustains a finding that when lots were sold in the plat, the sale was made in reference to the use to be made of the parks by the lot owners, moreover, there was no objection to the use of the parks on the part of the lot owners and the public generally until shortly before appellant Schurtz filed her bill of complaint. The making and recording of the plat, the sale of lots, the use of the streets and parks by the lot owners for a great many years estops appellant Schurtz from now claiming exclusive rights in the parks and streets. The parks as shown on the plat contained in the record indicate no severance or reservation of the water front. The lake is shown as adjoining the parks. It must therefore necessarily follow that the water front is a part of the street and parks and as such the rights of appellant Schurtz to the water front is coextensive only with other lot owners.

Schurtz, 286 Mich at 697. Accordingly, this Court has upheld a private dedication of a park in a plat and, should do so now.

Defendant/Appellee claimed in her Brief in Opposition to Plaintiff/Appellant's Application that this Court should ignore Schurtz because this Court wrongly "assumed" that a private dedication was legal. This is incorrect. The Schurtz Court expressly found that a private dedication was legal, quoting Westveer v Ainsworth, 279 Mich 580; 273 NW 275, 276 (1937) as follows:

> It is the great weight of authority that dedication by the owner–plattor–becomes irrevocable upon sale of lots by reference to the plat and he is estopped to vacate it. And the grantees of the dedicators are bound by the dedication.

Schurtz, 286 Mich at 696 (citations omitted).

In short, the Schurtz Court did not mince words or attach undue legal significance to the use of the word "dedication" in the plat at issue. Rather, the Court, sitting in equity, did equity and upheld the lot owners' historic and traditional use of the dedicated parks. In doing so, the Schurtz case led the way for a continual line of Michigan cases which refined the estoppel theory and, in determining the validity and scope of private dedications, looked to the "intent of the plattors."[2]

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[2] See, also, Smaltz v Lloyd, unpublished Opinion per curiam of the Court of Appeals, decided February 15, 2000 (Docket No. 208952), wherein the Court upheld a plat dedication which entitled plaintiffs and other owners of lots in the subdivision to have exclusive use of the subdivision's roads and parks, stating:

> On the plat map, the roads are designated as private and the dedication states that "the streets and parks as shown on said plat are hereby dedicated to the use of the lot owners, except that

(continued...)

D. Michigan Case Law Supports An "Intent Of The Drafters" Test For Private Dedications

The trial court considered the intent of the drafters of the Plat in reaching its decision. (Appellants' Appendix, p 218 a). The case relied on by the Court of Appeals in this case, Martin v Redmond, considered the intent of the drafters in reaching its decision. Martin, 248 Mich App at 67 (". . . any intent to dedicate the disputed portion of Outlot A to the public or to other lot owners was negated by the original owner's subsequent, inconsistent act of privately selling the dispute property."). As discussed below, in many Michigan cases, the courts considered the intent of the drafters to validate private dedications. However, the Court of Appeals in this case did not. This was reversible error.

The Court of Appeals, in this case, citing its prior decision in Martin, supra, said that all "dedications" must be for public use. However, after the Martin decision, this same Court of Appeals (in fact, the same Justice) said that where the plattor's grant/conveyance of the use of lake and lakefront property to back lot owners is treated as an easement, the private

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[2] (...continued)

> portion of public country road, contained herein." The only lots noted on the plat map are the twenty-five lots of Lloyd's Westgate Subdivision. Where the grantor's "intent cannot be determined from the plat, the contemporaneous and subsequent acts of the parties may be considered" in determining the scope of a dedication. *Jacobs v. Lyon Twp*, 444 Mich. 914, 921; 512 NW2d 834 (1994) (citation omitted). However, the plattors' intent is clear from the dedication here, and no construction of the dedication is necessary. The trial court did not clearly err in finding that the plain language of the plat dedication restricts the use of the subdivision roads to subdivision lot owners.

Smaltz, at p 2. For the Court's convenience, a copy of the Smaltz decision is attached as Exhibit 1.

"dedication" is legal. See, Little v Kin, 249 Mich App 502; 644 NW2d 375 (2002). Justice Saad (who authored Martin), writing for the Court, outlined the factors a court should look at, stating:

> While Michigan law does not permit the severance and transfer of riparian ownership or riparian rights normally enjoyed exclusively by owners of riparian land, it clearly allows a grantor to confer to non-riparian back lot owners an easement to enjoy such rights. Further, our courts have made clear that such a grant is not to be assumed; rather, a court must determine the scope of the non-riparian owners' rights as a question of fact, by examining the language of the easement and the surrounding circumstances at the time of the grant. Further, in determining these rights, the court must consider whether the use would unreasonably interfere with the riparian lot owners' use and enjoyment of their property.

Little, 249 Mich App at 513-514 (emphasis added). In addition, to determining the intent of the plattors, courts may inquire into the actions of the parties in determining the scope of the dedication. Jacobs, 444 Mich at 921.

Determining the intent of the plattors and the scope of the use of the dedicated property, using the factors cited above, is exactly what the trial court did in this case, but exactly what the Court of Appeals did not do. Defendant/Appellant argued previously that Little v Kin (quoted above) and the cases upon which it relies should be disregarded for the sole reason that the courts in those cases assumed, or determined, that the dedication at issue conveyed an "easement" (as opposed to a fee) to the back lot owners in the plat. Defendant/Appellee therefore argued that, only where the conveyance at issue is determined to be an "easement," is it then somehow magically taken out of the realm of illegal, private "dedications."

However, this distinction, without a meaningful difference, is the precise issue this Court is being asked to resolve. Why can one create a private "easement," but not have a private "dedication?" The Court of Appeals did not answer this question. None of the cases

relied on by the Court of Appeals in this case answered this question. Defendant/Appellee does not answer this question. Why? Because the only logical answer is that neither the mere use of the word "dedicated," nor whether the plat grants a fee interest or easement, should supplant the intent of the plattors and the long-standing use of the dedicated property by the residents. Nor is anything other than this logical answer compelled by Michigan case law.[3]

The Court of Appeals' decision in Little v Kin, is supported by a recent line of Michigan cases starting with Thies v Howland, 424 Mich 282; 380 NW2d 463 (1986) in which this Court upheld the legality of a private dedication in a 1907 Plat which stated that "driveways, walks and alleys [were] . . . dedicated to the joint use of all the owners of the plat." This Court held that the appropriate inquiry in determining both the nature and scope of the dedication was the intent of the plattors looking at "the language used and the surrounding circumstances." Theis, 424 Mich at 293. Notably, based on the intent of the drafters test, this Court was prepared to uphold the dedication, irrespective of whether it conveyed a fee interest or easement. This Court stated:

> The question is whether the plat's dedication of the walk "to the joint use of all the owners of the plat" was intended to convey a fee in the walk to all subdivision owners or merely granted them an easement along the lakeshore. The intent of the plattors must be determined from the language they used and the surrounding circumstances.

Thies, 424 Mich at 293.

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[3] In fact, under Michigan law, common law dedications (such as the one at issue here), as opposed to statutory dedications, usually confer a mere easement as opposed to a fee. Gunn v Delhi Twp, Ingham Cty, 8 Mich App 278; 154 NW2d 598 (1967). Thus, to interpret the dedication at issue here as a grant of an easement, as did the trial court, is consistent with its common law origins.

In opposing Plaintiff/Appellant's Application, Defendant/Appellee did not discuss the Thies opinion except to say that it involved an easement and, should therefore be disregarded. (Defendant/Appellee's Brief in Opposition to Application, pp 15-16). However, for the reasons stated before, and for the reason that the Thies Court would have upheld the dedication even if it had been determined that it conveyed a fee, Defendant/Appellee is incorrect.

Similarly, in Dobie v Morrison, 227 Mich App 536; 575 NW2d 817 (1998), the plaintiffs, the current owners of a lot bordering a dedicated park area, brought a quiet title action against back lot owners in the same subdivision asking that the court declare plaintiffs to be the fee simple title holders to the park. In 1966, the plattors of the subdivision dedicated the park to "the use of the owners of lots in this plat which have no lake frontage." Dobie, 227 Mich App at 537. Despite the use of the word "dedicated," the trial court determined that the defendant/back lot owners held an easement in the park and held a 1-day bench trial to determine the scope of that easement. Dobie, 227 Mich App at 538. The Court of Appeals affirmed the trial court's decision, stating that the relevant inquiry is the intent of the plattors. Dobie, 227 Mich App at 540. See also, Fry v Kaiser, 60 Mich App 574; 232 NW2d 673 (1975), wherein the Court of Appeals upheld, 1950 plat language which stated "that the channels as shown on said plat are hereby dedicated to the use of the lot owners," as a valid easement.

Defendant/Appellee previously argued that Dobie is distinguishable from the present case because the dedication at issue in Dobie was for "the use" of the owners and the dedication at issue in this case is "to" the owners. Thus, Defendant/Appellee concludes that, in this case, there was no intent on the part of the original plattors to create an easement (Defendant/Appellee's Brief in Opposition to Application, p 16). Again, however, this argument

promotes form over substance and use of a strained legal analysis of a particular word. In this case, the clear intent of the drafters of the Plat was that all residents of Ye-ga-qua-mak Subdivision be able to use the Parks. The history of Ye-ga-qua-mak Subdivision is that all residents have been able to use the Parks. That intent and history is what should prevail in this case. Moreover, Defendant/Appellee has never pointed to any Michigan case in which the court refused to uphold a dedication based solely on this "use" versus "to" distinction.

In short, if the Plat in this case had contained the word "easement" instead of the word "dedication," there would likely be no question as to the legality of the grant or conveyance made by the original plattors. Further, presumably if the Plat in this case had used the language dedicated to "the use" of the owners, as opposed to dedicated "to" the owners, again there would likely be no question as to the legality of the "dedication."[4]

However, many early plats use the word "dedication," instead of "easement." Many early plats also simply dedicate parks and other recreational areas "to" the lot owners. To now eradicate property owners' rights of access to, and use of, beaches, lakes, etc. based solely on the use of the word "dedication" in a plat or lack of the word "use" (particularly where the residents' use of the dedicated lands has been consistent for many years) is inequitable and unnecessary under Michigan law. Case law supports the legality of private dedications in Michigan. Further, case law supports an intent of the drafters and historical use of the property inquiry to determine the dedication's validity and scope.

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[4] Yet, given the overreaching nature of the Court of Appeals' holding in this case, that all private dedications, based solely on the use of the word dedication, are illegal, even these conclusions are suspect.

In sum, a case-by-case inquiry, as opposed to an absolute "no private dedications law" is in the best interest of the residents of the State of Michigan and the jurisprudence of this State. Because this is precisely what the trial court did in this case, the Court of Appeals' opinion must be reversed and the trial court's opinion reinstated.

E. The Court Of Appeals Relied On Distinguishable Case Law

The Court of Appeals relied, primarily, on Martin v Redmond, 248 Mich App 59; 638 NW2d 142 (2001) for its conclusion that all private "dedications" in the State of Michigan are illegal. (Appellants' Appendix, pp 242 a - 243 a). As discussed below, not only is the Martin Court's decision wrong, but, in addition, the Martin Court relied primarily on case law which is clearly distinguishable from this case; specifically, Kraushaar v Bunny Run Realty Co, 298 Mich 233; 298 NW 514 (1941). Martin, 248 Mich App at 68-69. As discussed below, Kraushaar, when limited to its facts – which are quite different from those in the present case – do not support the Court of Appeals' ruling in this case that the private "dedication" of the Parks to the lot owners is illegal.

In Kraushaar, plaintiffs had purchased lots in seven different platted subdivisions from Lake Home Realty Company, which was buying the subdivision land on seven different land contracts. Kraushaar, 298 Mich at 235-236. At the time of plaintiffs' purchases, Lake Home Realty Company promised plaintiffs, among other things, exclusive private use of a lake, beaches, athletic fields, tennis courts and clubhouse. Plaintiffs were also given "Membership Certificates" which provided that they were life members of Bunny Run Country Club so long as the land contract was observed. Kraushaar, 298 Mich at 236-237.

Lake Home Realty Company defaulted on one of the seven land contracts (Porritt farm) and, following summary proceedings, the vendors took back possession. The vendors then quit claimed the Porritt farm to Bunny Run Realty Company. Kraushaar, 298 Mich at 235.

The majority of the various facilities in which plaintiffs were promised life time, exclusive use of were located in a portion of Porritt farm known as Elizabeth Park. After Bunny Run Realty Company became owner of Porritt farm it began advertising in newspapers, inviting the public to Bunny Run Country Club for 25 cents per person. Kraushaar, 298 Mich at 237. Plaintiffs sued asking for an injunction, enjoining the public's use of Bunny Run Country Club. Plaintiffs claimed the public's use of Bunny Run Country Club was inconsistent with the exclusive, private use of the Club promised to them at the time they purchased their lots. Kraushaar, 298 Mich at 238.

This Court disagreed, holding that the purchasers of lots in the subdivisions other than Porritt farm obtained no contract rights binding upon either the original owners of Porritt farm or Bunny Run Realty Company. With respect to Kraushaar, who owned a lot in Porritt farm, this Court held that any title or rights obtained by Kraushaar from the Lake Homes Realty Company, which was only a contract vendee of the Porritt farm, were subject to the superior title of the vendors of that property. Therefore, this Court concluded that when the land contract was terminated by summary proceedings, all rights of these plaintiffs under these contracts vanished. Kraushaar, 298 Mich at 239-240.

Plaintiff Kraushaar next asserted a right to relief against Bunny Run Realty Company claiming that the vendors in the land contract for the Porritt farm joined with the vendees in a dedication in the plat. The dedication provided that the "drives, roads, boulevards

and terraces as shown on plat are hereby dedicated to the use of lot owners of the plat and proprietors to be maintained by same, excepting Miller Drive and Conklin Drive, which are hereby dedicated to the use of the public." Plaintiffs claimed that because of the express dedication of the drives, roads, etc. to the use of the lot owners, as opposed to the public, that only they had the right to use such drives and roads, to the exclusion of the general public. Kraushaar, 298 Mich at 241. Apparently, plaintiffs believed that if the public could not use the roads, the public could not get to Bunny Run Country Club to use its facilities.

This Court saw through this slightly veiled attempt by plaintiffs to get around what had been expressly prohibited by their limited contract rights – recall, plaintiffs' exclusive use "Membership Certificates" were only as good "so long as the land contract was observed" and the land contract had been forfeited. Therefore, this Court stated that the dedication did not grant plaintiffs exclusive use of the roads, etc. because there is no such thing as a dedication between an owner and individuals and that the public must be a party to every dedication. Kraushaar, 298 Mich at 242, quoting, 16 Am Jur, p 359.

However, despite these specific findings, the Kraushaar Court ultimately did not invalidate the dedication. Instead, the Court assured itself, and expressly made part of its decision, that its denial of plaintiffs' request for exclusive use of Bunny Run Country Club would not result in plaintiffs' own exclusion from use of the facilities. In point of fact, plaintiffs did maintain their rights to use all of the facilities of Bunny Run Country Club. Kraushaar, 298 Mich at 240. The Court of Appeals' decision in this case provides the opposite result – plaintiffs are excluded, entirely and forever, from using the Parks and only Defendant/Appellee may use the Parks.

Next, in order to reach a fair and reasonable result, the Kraushaar Court took the straightforward private dedication of the drives, roads, etc. "to the use of lot owners of the plat" and declared it to be a valid public dedication. Kraushaar, 298 Mich at 240. In this manner, the lot owners legally retained their right to use the Bunny Run Country Club facilities.

The Court of Appeals, in this case, relied on Kraushaar for the proposition that there can never, ever be a private dedication. The Court of Appeals, however, ignored the fact that the Kraushaar Court's decision was premised on the fact that the lot owners had not been excluded from using all of the facilities at Bunny Run Country Club – rather, the lot owners simply now had to share those facilities with a portion of the general public who were willing to pay 25 cents for access. In fact, the Kraushaar Court took explicit steps to assure the lot owners continued access to, and use of, the facilities by transforming what was clearly a private "dedication" (made solely "to the use of the lot owners") into a public dedication.

In short, Kraushaar does quote Am Jur for the proposition that dedications must be to the public. However, the Kraushaar Court went on to achieve an equitable result (even transforming a clearly private dedication into a public dedication). This is something the trial court did and Court of Appeals should have done using the "intent of the plattors" test. The Court of Appeals' failure to do equity is reversible error.

In fact, in this case, if the dedication of the Parks were treated as a public dedication and Defendant/Appellee prevailed on her initial argument, that the dedication was abandoned, the result would be equitable. It is well-established in Michigan law that where a public dedication fails or has been abandoned, the property owners nonetheless retain private easement rights in the dedicated land. Nelson v Roscommon Cty Road Comm, 117 Mich

App 125, 132; 323 NW2d 621 (1982). Therefore, the logical application of the Kraushaar decision to the facts in this case is to achieve the same result as did the trial court albeit by a different theory. Specifically, an abandoned public dedication of the Parks and a private dedication of the Parks determined by the intent of the plattors and historical use to be an easement, have the same result – all property owners within the Plat maintain a private right of use. Accordingly, based on the result achieved, Kraushaar actually supports the trial court's decision in this case.

Both the Court of Appeals and Defendant/Appellee, cited Martin for the absolute rule of law that common law private dedications in plats are illegal in Michigan. Upon closer review of Martin, however, and assuming for the sake of argument that this is the holding of Martin, all the Court of Appeals did in Martin to reach its conclusion was to quote Kraushaar – which, as discussed above, does not support this conclusion at all. Martin, 248 Mich App at 68-69.

Rather, the real issue in Martin, involved statutory dedications and the court's construction of the Land Division Act (previously, the Subdivision Control Act) at MCL 560.253; MSA 26.430(253), and the plat acts which preceded the Subdivision Control Act. Martin, 248 Mich App at 64-68. The Martin Court, albeit incorrectly, construed the following language of the Land Division Act to allow only public dedications:

> When a plat is certified, signed, acknowledged and recorded as prescribed in this Act, every dedication, gift or grant to the public **or any person, society or corporation marked or noted as such** on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and

> assigns to the donees for their use for the purposes therein expressed and no other.

MCL 560.253(1); MSA 26.430(253)(1) (emphasis applied).

The Court of Appeals in this case, took express notice of the fact that the Martin decision involved a 1969 statutory dedication which was subject to the 1967 Subdivision Control Act. The Court of Appeals, however, went astray when it then took the illogical leap from statutory dedications to common law dedications based solely on the Martin Court's conclusory statement that it had thoroughly reviewed all relevant case law. (Appellants' Appendix, p 242 a, citing Martin, 248 Mich App at 65). However, the Martin Court's "thorough" review of the case law, as cited in the opinion, is limited to two cases – one in 1996 and one in 1899. The Court of Appeals in Martin, fails to discuss all of the case law in between 1899 and 1996 and thus, like the Court of Appeals in this case, fails to consider the Schurtz, Smaltz, Dobie and other opinions discussed, supra.

Moreover, the two cases cited in Martin, to support its conclusion that, "dedication" refers only to public use both before and after the platting statutes, are as inapplicable to this case as the Martin decision itself. The case cited by Martin for the proposition that private dedications are not permitted by common law even after the Subdivision Control Act is Attorney General ex rel Dept of Natural Resources v Cheboygan Cty Board of Cty Road Commissioners, 217 Mich App 83; 550 NW 821 (1996), lv denied 455 Mich 855 (1997). In that case, the Court of Appeals held that the doctrine of dedications and acceptance did not apply as between the state and county concerning trails that were already under the jurisdiction of

the state. Attorney General, 217 Mich App at 89. This case did not address a dedication that was made for the private use of lot owners.

Likewise, the case cited by the Court of Appeals in Martin for the proposition that common law private dedications were not permitted before the Subdivision Control Act does not support that proposition. In Patrick v Young Men's Christian Assn of Kalamazoo, 120 Mich 185; 79 NW 208 (1899), the Court construed an 1827 statute as requiring that dedications be made to the public. Patrick, 120 Mich at 191-192. The Court did not rule on a private common law dedication. Accordingly, the cases cited in Martin and, in turn, relied on by the Court of Appeals in this case, did not even discuss common law private dedications, much less rule that all common law dedications in all plats in the State of Michigan must be to the public, or be deemed illegal.

Finally, the Martin decision has a few important facts not present in this case. First, in Martin, the disputed property had been deeded by the plattor to others prior to the recording of the plat in 1969. Thereafter, the property was conveyed five additional times over the course of the next 32 years. The plaintiffs in Martin, who sought to stop the present owners of the disputed property from barring their access to the disputed property, apparently waited 30 plus years and several conveyances of the disputed property before making their objection. As stated by the Court of Appeals in Martin:

> . . . for nearly 30 years, defendants never challenged the numerous private sales of the disputed portion of Outlot A or asserted their purported rights when prior owners posted "No Trespassing" signs, and defendants failed to come forward with evidence that other lot owners actually used the disputed portion of the property. We also conclude that, on the basis of the continuous and unchallenged chain of title to the disputed property of the outlot and the lack of

> evidence showing that the disputed portion was used in the manner for which it was intended, the reservation or restrictive covenant rendered little value to defendants and its intended purpose has failed.

Martin, 248 Mich App at 72-73.

This case is quite the opposite. The Parks were not conveyed by the original plattor prior to recording the plat. In fact, the Parks have never been conveyed at all – much less 5 times. Plaintiffs/Appellants have not failed to use the Parks for the last 30 years. And, Plaintiffs/Appellants immediately challenged Defendant/Appellee's attempt to exclude their use of the Parks.

Further, the dedication at issue in Martin was subject to a subdivision restriction which provided that the conditions, covenants, charges, easements, agreements and rights contained in the restriction shall continue for a period of 25-years from the date of recording. Martin, 248 Mich App at 61. Based on these facts, the Court in Martin held that the restrictions applied to the disputed property and, assuming a lawful dedication, the dedication expired in November, 1994. Martin, 248 Mich App at 71-72. There is no such restriction in this case. Moreover, there is no expiration date for the dedication of the Parks in this case.

In sum, the Martin case is simply not applicable to this case based on its facts. Moreover, Martin, upon closer scrutiny, should not be read to support the all encompassing, absolute rule of law that private dedications in Michigan are illegal. In fact, the Martin decision is simply incorrect given the express language of the Land Division Act quoted supra, which clearly allows dedications to a private "person, society or corporation." MCL 560.253(1); MSA 26.430(253)(1).

IV. CONCLUSION AND RELIEF REQUESTED

In conclusion, private dedications are supported by Michigan law. The intent of the plattors and historical use of the dedicated property, considering the equities of the parties, controls. This is precisely what the trial court did in this case and its verdict should have been upheld by the Court of Appeals. Therefore, this Court should vacate the Court of Appeals' decision and reinstate the decision of the trial court.

MCCLELLAND & ANDERSON, LLP
Attorneys for Amicus Curiae Michigan Association of REALTORS®

By:_____
Gregory L. McClelland (P28894)
Melissa A. Hagen (P42868)
Business Address:
1305 S. Washington Ave., Ste. 102
Lansing, Michigan 48910
Telephone: (517) 482-4890

Date: June 12, 2003

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Ronald SMALTZ and Marlene Smaltz, Plaintiffs/ Counterdefendants-Appellees,
v.
Merle LLOYD, Defendant/Counterplaintiff-Appellant.

No. 208952.

Feb. 15, 2000.

Before: ZAHRA, P.J., and KELLY and McDONALD, JJ.

PER CURIAM.

***1** Defendant appeals as of right from the December 29, 1997, order of judgment entered after a bench trial. We affirm.

The trial court enjoined defendant from using roads within a platted subdivision to access land he owns outside the boundaries of the subdivision. The trial court also dismissed defendant's counter-complaint, which sought to force plaintiffs to remove encroachments from the right-of-way of a subdivision road. On appeal, defendant argues that the trial court erred in awarding plaintiffs equitable relief because they had unclean hands, erred in ruling that a plat dedication entitled plaintiffs and other owners of lots in the subdivision to have exclusive use of the subdivision's roads and parks, and erred in ruling that defendant was not entitled to continue his use of the roads for access to his property located outside the platted subdivision.

Initially defendant argues that the trial court erred in failing to order plaintiffs to remove encroachments in road right-of-way. When property is encroached on, fashioning an appropriate remedy requires the balancing of the relative hardship to the parties and the equities between them. Ultimately, the factors may balance in favor of denying relief to the party seeking the removal of the encroachment. *Kratze v Independent Order of Oddfellows, Garden City Lodge No 11,* 442 Mich. 136, 142; 500 NW2d 115 (1993). No balancing of the hardships is required if the encroachment resulted from an intentional or willful act. *Kernen v. Homestead Development Co,* 232 Mich.App 503, 508; 591 NW2d 369 (1998).

In the instant case, plaintiffs placed a culvert, rocks, a garden, a portion of a septic drainfield and a propane tank in the sixty-foot right-of-way of the road. All parties testified that none of these encroachments interfered with the nine to ten feet that made up the traveled portion of the road. Further, a surveyor hired by defendant testified that the rocks placed in the ditch may actually maintain the stability of the road by preventing erosion. Defendant did not place proofs on the record that tended to show that plaintiffs willfully and intentionally placed encroachments in the right-of-way of the road. Therefore, it was appropriate for the trial court, in balancing the equities, to rule that the encroachments need not be removed.

Next, defendant argues that plaintiffs sought equity without clean hands, citing their encroachments and use of subdivision roads to access their non-subdivision lot. It is a well-established equitable maxim that those who seek equity must do so with "clean hands." *Stachnik v. Winkel,* 394 Mich. 375, 382; 230 NW2d 529 (1975). Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief. *Id.* at 386.

While plaintiffs admittedly walk over a subdivision road to mow or play tether ball on their parcel of non-subdivision land, their use of the road does not burden or increase the traffic on the road system. Rather, plaintiffs' use is incidental to the ownership of their subdivision land. Plaintiffs do not engage in the same conduct they sought to enjoin, since they merely walk across a narrow strip of road. This is in no way identical to non-subdivision owners traveling by car or truck through the subdivision. The trial court properly concluded that plaintiffs were not prevented from seeking equitable relief under the doctrine of unclean hands.

***2** Defendant also argues that the trial court erred in holding that the dedication in the subdivision plat map entitled plaintiffs and other owners of subdivision lots to exclusive use of the development's roads and parks. "In equity cases,

this Court's review of the record is de novo with due deference being given to the findings of the trial court. This Court will sustain those findings unless its ruling would have been contrary to that of the trial court." *Marconeri v. Village of Mancelona,* 124 Mich.App 286, 287-288; 335 NW2d 21 (1983). If the trial court's findings of fact are not clearly erroneous, then this Court reviews the record de novo to determine whether the equitable relief granted was appropriate in light of those facts. *Attorney General v. John A Biewer Co, Inc,* 140 Mich.App 1, 12-13; 363 NW2d 712 (1985). The trial court did not err in ruling that the roads in the subdivision were dedicated to the use of only subdivision owners and that defendant had not acquired a prescriptive easement to use the roads.

Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable injury. *ETT Ambulance Service Corp. v. Rockford Ambulance, Inc,* 204 Mich.App 392, 400; 516 NW2d 498 (1994) Michigan courts generally enforce valid restrictions on property use by issuing an injunction. *Webb v. Smith,* 224 Mich.App 203, 211; 568 NW2d 378 (1997).

Defendant argues that the intent of the plattors governs and that the intent of plattors--defendant and his brother--is best determined by simply asking them what they intended when the subdivision was platted. "The intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant." *Thies v. Howland,* 424 Mich. 282, 293; 380 NW2d 463 (1985); *Dobie v. Morrison,* 227 Mich.App 536, 540; 575 NW2d 817 (1998).

On the plat map, the roads are designated as private and the dedication states that "the streets and parks as shown on said plat are hereby dedicated to the use of the lot owners, except that portion of public county road, contained herein." The only lots noted on the plat map are the twenty-five lots of the Lloyd's Westgate Subdivision. Where the grantor's "intent cannot be determined from the plat, the contemporaneous and subsequent acts of the parties may be considered" in determining the scope of a dedication. *Jacobs v. Lyon Twp,* 444 Mich. 914, 921; 512 NW2d 834 (1994) (citation omitted). However, the plattors' intent is clear from the dedication here, and no construction of the dedication is necessary. The trial court did not clearly err in finding that the plain language of the plat dedication restricts the use of the subdivision roads to subdivision lot owners.

In addition, the trial court did not clearly err in ruling that defendant had not acquired a prescriptive easement to use subdivision roads to access his non-subdivision property. An easement is a right to use the land of another for a specific purpose. *Mumaugh v. Diamond Lake Cable,* 183 Mich.App 597, 606; 456 NW2d 425 (1990). An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Thomas v. Rex A Wilcox Trust,* 185 Mich.App 733, 736-737; 463 NW2d 190 (1990); *Dyer v. Thurston,* 32 Mich.App 341, 343; 188 NW2d 633 (1971); MCL 600.5801; MSA 27A.5801. A use is "adverse" when it would entitle the landowner to a cause of action against the trespasser. *Goodall v. Whitefish Hunting Club,* 208 Mich.App 642, 245-246; 528 NW2d 221 (1995).

***3** Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession. *Rozmarek v. Plamondon,* 419 Mich. 287, 294; 351 NW2d 558 (1984). The permissive use of property, regardless of the length of the use, will not result in an easement by prescription. *West Michigan Dock & Market Corp v Lakeland Investments,* 210 Mich.App 505, 511; 534 NW2d 212 (1995).

In this case, while the trial court found no prescriptive easement, part of the court's reasoning is inconsistent because it found that defendant's pre-1986 use of the roads was permissive while at the same time holding that defendant's current ownership did not allow for such permissive use. Despite this inconsistency, the trial court also ruled that defendant failed to meet the fifteen-year period of adverse use necessary to create a prescriptive easement, a ruling that is supported by the record. In the absence of clear error, therefore, we decline to reverse on the basis of this inconsistency.

Affirmed.

2000 WL 33534019 (Mich.App.)

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